



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Caroline Goodson
Perkins Coie LLP
607 14th Street, N.W.
Washington, DC 20005

OCT 28 2008

Re: MUR 5637
21st Century Democrats and Bill Combs, in
his official capacity as treasurer

Dear Ms. Goodson:

On January 14, 2008, your client, 21st Century Democrats and Michael Lux, in his official capacity as treasurer, was notified that the Federal Election Commission found reason to believe that it violated 2 U.S.C. §§ 434, 441a(f), and 441b(a) and 11 C.F.R. §§ 102.5, 104.10, and 106.6. After considering the circumstances of the matter, the Commission determined on October 21, 2008, to take no further action as to 21st Century Democrats and Bill Combs, in his official capacity as treasurer, and closed the file in this matter. The Factual and Legal Analysis, which explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Jm McConnell", with a circular flourish at the end.

Julie K. McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

28044221241

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

**Respondent: 21st Century Democrats and Bill Combs,
in his official capacity as treasurer**

MUR: 5637

I. INTRODUCTION

This matter arises from a complaint alleging that 21st Century Democrats violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by accepting excessive contributions and using insufficient Federal funds to pay for its activities during the 2004 election cycle. The Commission previously found reason to believe that 21st Century Democrats, an unincorporated non-connected political committee with Federal and non-Federal accounts, and Michael Lux,¹ in his official capacity as treasurer, violated 2 U.S.C. §§ 434, 441a(f), and 441b(a) and 11 C.F.R. §§ 102.5, 104.10, and 106.6. These findings were based on information indicating that 21st Century Democrats failed to properly allocate hundreds of thousands of dollars in Federal and non-Federal funds it received and disbursed and used insufficient Federal funds to pay for its predominantly Federal and mixed Federal/non-Federal activities in 2003-2004.

II. FACTUAL AND LEGAL ANALYSIS

21st Century Democrats is a Washington, DC based unincorporated organization established in 1988 with Federal and non-Federal accounts. According to its website, 21st Century Democrats is committed to providing "progressive and populist candidates the support they need to win elections." <http://www.21stcenturydems.org/aboutus> (visited October 12, 2007). Pursuant to 11 C.F.R. § 106.6(a), 21st Century Democrats registered its Federal account with the Commission as a non-connected political committee. 21st Century Democrats'

¹ Bill Combs replaced Michael Lux, the treasurer at the time of the alleged violations, on April 20, 2006.

1 non-Federal account filed disclosure reports with the Internal Revenue Service under Section 527
2 of the Internal Revenue Code. *See* 26 U.S.C. § 527. During the 2004 cycle, 21st Century
3 Democrats' Federal account raised \$5.1 million, while its non-Federal account disclosed receipts
4 totaling \$2.7 million.

5 **A. DISBURSEMENTS**

6 **1. Factual Background**

7 Prior to the 2004 election cycle, 21st Century Democrats focused on providing financial
8 and logistical support directly to progressive candidates for State and Federal office.
9 According to Kelly Young, the former president of 21st Century Democrats, 21st Century
10 Democrats made monetary contributions to State and Federal candidates and also recruited and
11 trained organizers and campaign staff and placed them with specific candidates. In some, but not
12 all, instances, 21st Century Democrats paid the salary of the individual placed with a specific
13 candidate and treated the cost as an in-kind contribution to the recipient committee. During the
14 2004 election cycle, 21st Century Democrats provided \$31,718.18 in cash and in-kind
15 contributions to candidates for Federal office and \$285,312.28 in non-Federal cash and in-kind
16 contributions to candidates for State office.

17 In addition to these amounts, 21st Century Democrats spent approximately \$7.5 million
18 total during the 2004 election cycle.² These expenditures included approximately \$3.6 million in
19 Federal funds for telemarketing and direct mail expenses related to its fundraising efforts,³ as
20 well as funds spent on four programs established to help attract support for progressive issues
21 such as unemployment, the war in Iraq, and abortion rights, which it allocated between its
22 Federal and non-Federal accounts.

² *See* 21st Century Democrats 2004 FEC Disclosure Reports; IRS Form 8872s.

³ *See id.*

28044221244

1 The largest program, on which 21st Century Democrats spent approximately \$1 million in
2 allocated Federal/non-Federal disbursements, was the Youth Voter Project ("YVP"), whose
3 purpose was to increase Democratic voter turnout by increasing the number of voters between
4 the ages of eighteen and thirty-four in Ohio, Oregon, and Minnesota.⁴ The program consisted of
5 voter identification and registration efforts, a persuasive effort focused on helping get voters to
6 focus on issues important to them, and a get-out-the-vote effort. Although Young, who spent
7 approximately twenty percent of her time on YVP-related matters, had ultimate decision-making
8 authority, Lilah Pomerance, a 21st Century Democrats employee working in Washington, DC
9 office, was the Director of the YVP. Pomerance coordinated with each State director, who in
10 turn had a staff of coordinators and canvassers to make contact with potential voters.

11 2. **Allocation of Expenditures**

12 Under the rules in effect during the 2004 election cycle, non-connected political
13 committees were required to pay administrative expenses attributable to clearly identified
14 Federal candidates and voter drive expenses that mentioned specific Federal candidates entirely
15 with Federal funds. *See* 11 C.F.R. §§ 106.1 and 106.6(b)(2)(i)-(iii) (2004); *see also* AO 2003-37
16 at 11-13. In contrast, administrative expenses not attributable to clearly identified candidates, as
17 well as the costs of generic voter drive communications that did not mention a specific Federal
18 candidate, could be allocated according to the "funds expended" method, which compares the
19 amount of direct candidate support for Federal candidates (*i.e.*, amounts contributed to or
20 otherwise spent on behalf of specific Federal candidates) to the amount of direct candidate

⁴ The other programs were the Field Organizer Program discussed above, which recruited campaign workers and placed them with specific Federal, State and local candidates; the Democracy for America Project, which trained activists to discuss specific issues with potential voters; and Oregon Deep Blue, which was a get-out-the-vote effort aimed at increasing voter turnout in traditionally Democratic districts.

support for all Federal and non-Federal candidates. See 11 C.F.R. §§ 106.6(b)(2)(i)-(iii) and (c) (2004).

(a) **21st Century Democrats Only Considered Direct Contributions to Candidates in Calculating Its Allocation Ratio for the 2004 Election Cycle**

At the start of the 2004 election cycle, 21st Century Democrats allocated the cost of administrative expenses and generic voter drives based on an allocation ratio of 25% Federal and 75% non-Federal. In June 2004, 21st Century Democrats modified the ratio and began allocating administrative and generic voter drive expenses based on an allocation ratio of 10% Federal and 90% non-Federal. According to its subpoena response, 21st Century Democrats calculated this ratio by taking the total amount spent on direct contributions to Federal candidates (\$31,718.18) and dividing it by direct contributions to Federal and non-Federal candidates (\$317,030.36).

If any of 21st Century Democrats' communications expressly advocated or were otherwise made on behalf of a Federal candidate, it would alter the allocation ratio and could result in the committee having paid for Federal activity with non-Federal funds. See 11 C.F.R. §§ 106.6(b)(2)(i)-(iii) and (c) (2004). However, as discussed below, the disbursements made in connection with the YVP did not contain express advocacy or other constitute spending on behalf of a federal candidate, and thus did not alter the 21st Century Democrats' allocation ratio.

(b) **Disbursements for the YVP Were Allocable and Did Not Alter the Funds Expended Ratio**

Information available at the reason to believe stage suggested that the focus of the YVP was on electing Senator John Kerry as President of the United States.⁵ In addition, in response to

⁵ For example, press articles quoted Ms. Young and other high-level YVP employees as stating "I am impressed by the dedication of hundreds of young volunteers – and the commitment of young voters – to electing John Kerry and the Democratic ticket" and that the YVP would "recruit[] thousands of activists to knock on doors, make phone calls and talk to voters about defeating Bush in 2004." Adam Ebbin, *New Campaign Offices Open in Minnesota, Ohio and Oregon*, available at <http://www.21stcenturydems.org> (Aug. 17, 2004); Laila Hirschfeld, 21st

our subpoena request, 21st Century Democrats provided documents describing the YVP and its operation that initially confirmed this interpretation. For example, a presentation titled "21st Century Democrats – On the ground for progressive candidates" stated that the YVP would "turn out an additional 2% of the youth vote in each state for John Kerry." Other documents appeared to be pro-Kerry or anti-Bush door scripts used by YVP canvassers in 2004 to "help get Bush out of office" or to "sway [voters] towards Kerry."⁶

Despite these documents, witness interviews and other materials provided by individuals no longer employed by 21st Century Democrats indicate that YVP staff did not engage in any direct candidate support for Federal candidates. Although many documents referenced specific candidates for Federal office, witness statements establish that these references were removed prior to any communication with the general public. In addition, information and documents produced by 21st Century Democrats and its employees, including a computer hard drive containing advice of counsel, demonstrate that 21st Century Democrats took steps to ensure that the canvassers contacting potential voters did not reference any candidate for Federal office.

In her interview, Young explained that references to specific candidates were not part of the YVP. For example, a 21st Century Democrats presentation regarding the YVP focused on the effect of the program on the Presidential race because donors "understand things in terms of the most important race." Young explained the references to specific Federal candidates in door and

century Democrats Announce Hire of Oregon State Director, available at <http://www.21stcenturydems.org> (Dec. 12, 2003).

⁶ One draft door script asked the potential voter who they were likely to vote for for President. If the person responded Senator Kerry, then the canvasser would make sure they were registered to vote, gather contact information, and then inquire as to whether they could volunteer "to help get Bush out of office." If the person stated they intended to vote for President Bush, the canvasser simply thanked them and asked if there were any other 18-34 year olds living at the same address. A telephone script provided similar instructions but added that if a person stated he or she was undecided, "you will help sway them towards Kerry with the persuasion script." The persuasion script consisted of talking points such as "[i]n George Bush's America, 45 million Americans do not have health insurance" and "John Kerry has a health care plan to extend affordable health coverage to all Americans. He plans to fund this project by rolling back Bush's massive tax cut to the wealthy."

1 telephone scripts by stating that these were draft scripts that would not have been approved for
2 use. She stated that, as the program grew, overeager staff members would draft materials that
3 mentioned Federal candidates and had to be told that the YVP was a generic voter drive and
4 could not refer to individual candidates for Federal office.

5 Similarly, Lilah Pomerance, the YVP Director, and each of the state directors, confirmed
6 that they were given instructions not to refer to specific candidates by name. Emma Greenman,
7 the Minnesota state director, explained that any script for voter contact was vetted by attorneys in
8 Washington, DC. Greenman also explained that the advertisement for "Jobs to Defeat George
9 Bush" was most likely a draft advertisement submitted by a campus director for approval.
10 Greenman stated that the job listing was too long, and that she recalled using a shorter
11 advertisement titled "Work for Change" instead.

12 In addition to these statements, additional documents from Evan Hutchison, the Ohio
13 state director, confirm that the YVP did not reference specific federal candidates. Hutchison
14 provided us with a computer that contained electronic files and mail messages related to the
15 YVP. While the majority of the documents consisted of generic door and telephone scripts
16 already produced by 21st Century Democrats, we obtained several additional documents that
17 corroborate Young's depiction of the YVP as a generic project that did not advocate for the
18 election or defeat of any candidate for Federal office. For example, we recovered an electronic
19 mail message from Young to the state coordinators forwarding a memorandum drafted by legal
20 counsel explicitly instructing canvassers not to mention the name of a Federal candidate,
21 including references such as "this President," "your representatives in Congress," or "the
22 Democratic nominee for Congress." Hutchison's electronic mail also contained messages
23 reminding canvassers in Ohio that their efforts are on behalf of "ALL Democratic candidates"

1 and that they should remove all references to President Bush and Senator Kerry from their
2 scripts.

3 Finally, in an effort to confirm these instructions and statements made at witness
4 interviews regarding the nature of the YVP as a non-candidate specific program, we also
5 interviewed individual canvassers in different states to determine what YVP canvassers actually
6 said to voters. According to some of the canvassers, they were given scripts that contained
7 "voter education points" and identified President Bush and Senator Kerry's positions on
8 numerous issues. However, they were explicitly told not to identify either candidate by name.
9 Another canvasser stated that she may have used a script including the words Democrat and
10 Republican, but does not recall any script including the name of a specific candidate. addition,
11 the canvasser recalls being instructed not to use the name of a specific candidate in conversations
12 with potential voters.

13 The witness statements, which were obtained from current and former 21st Century
14 Democrat employees, are credible because of their consistency with each other and with the
15 corroborating evidence located on the computer hard drive of a former YVP state director.
16 Based on this evidence, it does not appear that YVP canvassers contacting potential voters
17 expressly advocated or otherwise made disbursements on behalf of a candidate for Federal
18 office. 21st Century Democrats therefore did not have to pay for the cost of the YVP exclusively
19 with Federal funds, and the funds expended ratio used by the Committee during the 2004
20 election cycle adequately reflected the Committee's Federal and non-Federal expenditures.

B. FUNDRAISING

1. Factual Background

21st Century Democrats solicited funds through written solicitations to its members and through individual meetings with potential donors. Written solicitations made throughout 2004 sought Federal contributions to "defeat George Bush" and "restore compassionate, fair, forward-thinking leadership in the White House and Congress." The written solicitations included check-off boxes for contributions ranging from \$25 to \$140 as well as a box marked "[o]ther," and included a disclaimer stating "[y]our contribution will be used in connection with federal elections and is subject to the limitations and prohibitions of the Federal Election Campaign Act. Contributions not meeting these conditions will be returned." 21st Century Democrats paid for these solicitations with Federal funds and treated the receipts as Federal contributions.

21st Century Democrats' non-Federal account raised a total of \$1.38 million in donations of \$5,000 or more, including \$799,000 from individual contributors. The largest, a \$300,000 donation from Matthew Entenza, a Minnesota State Representative, was made in response to a direct solicitation by Young. According to Entenza, Young told him that the organization was raising funds to conduct a voter mobilization effort targeted at young voters, but that the project would not endorse any specific candidates for State or Federal office.⁷ Indeed, Entenza represented that he donated funds to 21st Century Democrats in the "belief that the money was to be used solely and exclusively for non-[F]ederal purposes."

⁷ Young used PowerPoint presentations to solicit funds in meetings with small groups of supporters between April and October 2004. One presentation used by Young described the aim of the Youth Voter Project as "increas[ing] the youth vote for Democrats by 2% in 5 targeted states" and "turn[ing] out an additional 2% of the youth vote in each state for John Kerry," and outlined 21st Century Democrats' fundraising needs for this project. Young explained that, although the purpose of the program was to increase Democratic votes, the presentation named Kerry because, "When I dealt with donors, they understand things in terms of the most important race." In her presentations, however, Young told potential donors that the YVP would not endorse any individual candidate for office.

2. **21st Century Democrats Does Not Appear to Have Received Excessive Contributions**

Based on our investigation, it appears that 21st Century Democrats took the proper steps to ensure that contributions made in response to written solicitations targeting the election or defeat of Federal candidates were limited to Federally permissible funds, and that contributions in amounts or from sources prohibited by the Act were only used for non-Federal activities. Written solicitations that referenced a candidate for Federal office contained language expressly limiting the solicitation to Federally permissible amounts and sources. While the presentation used by Young in oral solicitations may have mentioned that voter drive efforts would increase turnout for Senator Kerry, we have no information establishing that 21st Century Democrats otherwise indicated in oral solicitations to prospective donors that the funds received would be targeted to the election of Senator Kerry or the defeat of President Bush, or that such solicitations resulted in the receipt of contributions. *See FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (fundraising solicitation clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified candidate for Federal office results in contributions under the Act).

III. CONCLUSION

Based on the foregoing, the Commission takes no further action with respect to 21st Century Democrats and Bill Combs, in his official capacity as treasurer.